No. 383.

Brief of Carlisle & Johnson for Petitioners.

Filed Dec 7th, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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EDWARD M. WILLIS AND WILLIAM G. JOHNSON,
Assignees, Petitioners.

vs.

THE EASTERN TRUST AND BANKING CO.
Respondent.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR PETITIONERS.

CALDERON CARLISLE,
WM. G. JOHNSON,
For Petitioners.

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BRIEF FOR PETITIONERS.

This cause is brought here by a writ of *certiorari* (Rec. 32) from this court to the Court of Appeals of the District of Columbia to review the judgment of the latter court (Rec. 30). The case had been brought here by writ of error and was heard at the last term but the writ of error was dismissed for want of jurisdiction.

Willis *vs.* Eastern Trust & Banking Co., 167 U. S. 76.

By the order of this court passed May 24, 1897, the cause was advanced to be submitted on printed briefs to be filed on or before the second Monday of this term and in obedience to that order this brief is filed on behalf of the petitioners.

The proceeding by which this litigation was begun was an attempt by a Maine Trust Company, not authorized by its charter or by Congress to do business in the District of Columbia, to enforce a deed of trust as to real property in

this District, as against an assignee for the benefit of all creditors, including those secured by the deed of trust, not by appropriate proceedings in equity, but before a justice of the peace, a court of limited and special jurisdiction, and by a limited and special statutory proceeding, viz.: under the Landlord and Tenant Law.

STATEMENT OF THE CASE.

The respondent is a corporation created by a special charter from the Legislature of the State of Maine (Rec. 8. 10), and claims under a deed of trust in the nature of a mortgage to secure bonds in the amount of forty thousand dollars conveying real property in the State of Maine and in the city of Washington (Rec. 11, 19).

The proceeding which this writ brings up for review originated before a justice of the peace in this District upon the allegation that the petitioners were tenants by sufferance of the respondent, whose tenancy and estate in the land had been determined by the service of a thirty days' notice to quit (Rec. 1, 2).

The property involved, which is located in the city of Washington, as also certain property in Maine, is claimed to have been sold by the respondent, as trustee, by a public auction in the city of Bangor, Maine (Rec. 7).

To whom the property was sold, for what price, and upon what terms nowhere appears.

It is readily admitted on behalf of the assignee petitioner here that whatever the legal infirmities of the Maine Trust Company in regard to this trust in the District of Columbia, the said company and the bondholders secured have the fullest right to the protection of a court of equity, to which tribunal the petitioner is amenable as to his own trust, and any other affecting his rights or the property assigned, but the contentions of the assignee petitioner are:

I. That the Maine Trust Company cannot in any court of law in the District of Columbia insist upon a legal right to enforce the deed of trust—

(*a*) because its charter confined the operations of the company to the State of Maine;

(*b*) because the policy of the laws of Congress relating to the District of Columbia, did not, at the date of the deed, permit the acceptance by a foreign corporation of the trust;

(*c*) because the policy of the laws of Congress relating to the District of Columbia did not, at the date of the attempted execution of the trust, permit such execution by a Maine Trust Company which has not complied with the conditions required by Congress.

II. The relation of landlord and tenant did not exist between the parties, and for that reason the justice of the peace had no jurisdiction of the particular proceeding chosen.

The petitioner, Johnson, assignee of the American Ice Company, the grantor of the respondent, claims the title to the property by virtue of the deed of assignment to him for the benefit of creditors (Rec. 5).

Under the deed of assignment and under the law authorizing its execution (act of February 24, 1893, 27 Stat., p. 474), he has the duty of protecting all the creditors of the American Ice Company, both resident and nonresident, secured and unsecured, and believing this to be an attempt by some of the bondholders to sacrifice the property and secure it for themselves to the exclusion of other creditors, deems it to be his duty to resist such attempt.

It is not denied that the bondholders have an equitable lien for the security of their bonds which they can properly enforce in the courts of this District as the first lien on the property, but it is denied that the respondent has the legal title to said property, or the right of possession thereof.

The respondent claims to have sold the property in pursuance of the mortgage because of default in the payment of the bonds and that as part of the terms of sale the respondent agreed to secure possession of the property for the purchaser (Rec. 7).

By the second article of the deed of trust under which respondent claims (Rec., pp. 15, 16), the trustee is authorized to sell the land upon default, and to make a valid conveyance thereof to the purchaser, either in its own name or in the name of its grantor; and it is further provided (Rec., p. 16) that—

> "ANY SALE made as aforesaid shall be a PERPETUAL BAR *both at law and in equity*, against the American Ice Company, and all persons claiming by, through, or under it from claiming the property, rights, interests and franchises so SOLD *or any interest therein*."

The third article (Rec. 16) contains a waiver of the right to redeem under any existing or future laws of the United States. By the same article the right to the ordinary remedy by judicial proceedings for foreclosure is expressly secured (Rec. 16).

When the proceedings were instituted before the justice of the peace, the petitioners interposed a plea of title in accordance with the provisions of the statute and the rules of court (Rec. 2, 3), and the cause being certified to the Supreme Court of the District of Columbia, judgment was entered for the petitioners (Rec. 21), which judgment was reversed by the Court of Appeals (Rec. 30) and a writ of error sued out.

As above stated this writ of error was dismissed for want of jurisdiction after argument on the merits at the last term, but the court deemed the cause of sufficient importance to warrant bringing it up by this present writ of *certiorari* unembarrassed by any question of jurisdiction.

ASSIGNMENTS OF ERROR.

The court below erred—

1. In holding that the Maine corporation was legally competent to execute the trust in the District of Columbia by any proceedings at law.

2. In holding that the terms of the deed of trust constituted the relation of landlord and tenant between the Maine Company and its grantor within the true intent and meaning of the laws in the District of Columbia.

3. In holding that the justice of the peace had jurisdiction of the proceeding brought by the Maine Company.

4. In holding that respondent was entitled to judgment.

5. In not giving judgment for the petitioners.

ARGUMENT.

The deed of trust in this case undoubtedly constituted a valid equitable first lien to secure whatever was due to the bondholders, but the Maine Trust Company, the respondent had no legal and competent authority actively to execute the trusts in this District.

I.

The Maine Company was Legally Incompetent Actively to Execute Trusts in this District.

This deed was executed December 31, 1889 (Rec. 18), and recorded here January 13, 1890 (Rec. 11). At that time there was no law in force here permitting corporations of this character to be created or to act in this District.

Counsel are not unmindful of the ruling of this court in Christian Union *vs.* Yount, 101 U. S. 352, and the cases there referred to, but it is respectfully submitted that this corporation is not within the principles of that case.

By the terms of the charter creating the respondent certain limitations were imposed which are utterly inconsistent with its exercise of the functions here attempted. A corporation, while a legal entity, can do no personal act, but must always act through agents.

By the second clause of the charter it is provided:

> "Section 2. The corporation hereby created shall be located at Bangor, Penobscot County, Maine, and may establish agencies *in any part of this State*" (Rec. 8).

Expressio unius exclusio alterius; and besides the purpose and importance of this limitation is accentuated by the reservations of the ninth section (Rec. 9), specially providing for visitation by the State's officer.

The laws of the United States contemplate that all foreign corporations doing business in this District shall have agencies here to answer the process of the courts of this District, as they would otherwise be wholly irresponsible.

By the eleventh section of the Act of Congress of February 22, 1867 (14 St. 404), now Section 790 of the Revised Statutes relating to this District, it is provided that:

> "In actions against foreign corporations doing business in the District, all processes may be served on the agent of such corporation or person conducting its business, or, in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, and such service shall be effectual to bring the corporation before the court."

It is clear from this that Congress did not intend that foreign corporations should carry on business here without being amenable to the courts of the District. And, as this corporation, by the terms of its charter, was precluded from having offices or agencies outside of the State it was expressly disabled from meeting the requirements of the laws in force in this District.

Moreover, when Congress did, for the first time, by the Act of October 1, 1890 (26 St. 625–632), authorize corpora-

tions of this character to be formed and to do business in this District, it imposed numerous restrictions and requirements not found in the charter of the respondent, indicating the purposes and policy of Congress in this District upon that subject.

The act further imposes specific restrictions upon foreign corporations as a condition precedent to their right to exercise any of the functions attempted to be exercised by the respondent here.

The eleventh section of that act provides:

> "That any safe deposit company, *trust company*, surety or guaranty company, or title insurance company, now incorporated and operating under the laws of the United States or of the District of Columbia, or any of the States, and now doing business in said District, may avail itself of the provisions of this act on filing in the office of the Recorder of Deeds of the District of Columbia, or with the Comptroller of the Currency, a certificate of its intention to do so, which certificate shall specify which one of the three classes of business set out in section one it will carry on, and shall be verified by the oath of its president to the effect that it has in every respect complied with the requirements of existing law, *especially with the provisions of this act*; that its capital stock is paid in as provided in section twenty-one of this act and is not impaired, and *thereafter* such company may exercise all powers and perform all duties authorized by any one of the subdivisions of section one of this act *in addition* to the powers *now lawfully exercised by such company*" (26 St. 628).

And in the fifth section there is the following proviso:

> " . . . Provided, however, that no corporation created and organized under the provisions hereof, or availing itself of the provisions hereof as provided in section eleven, shall be authorized *to transact the business of a trust company*, OR ANY BUSINESS OF A FIDUCIARY CHARACTER, until it shall have filed with the Comptroller of the Currency a copy of

> its certificate of organization and charter, and shall have obtained from him and filed the same for record with the said Recorder of Deeds a certificate that the capital stock of said company has been paid in and the deposit of securities made with said comptroller in the manner and to the extent required by this act" (Ib. 626).

It is not pretended that the respondent before its attempted foreclosure of the deed of trust and its proceedings here in this District, complied or attempted to comply with any of the provisions of the Act of 1890, or that it ever had an agent or place of business here as contemplated by section 790 of the revision above quoted.

It cannot be objected that the Act of Congress of October 1, 1890, could not apply because this deed to the respondent was executed in December, 1889, for by taking a conveyance to itself of a trust to be executed here, a foreign corporation could not defeat the power of Congress *to regulate the manner and conditions of its exercising its functions in this District.*

The right of a foreign corporation to operate at all in this District is subject to the will of Congress, which can at any time regulate or prohibit altogether the exercise of any of its functions here.

When, therefore, this respondent, in 1894, undertook actively to exercise its corporate functions as a trustee in this District, by the proceedings below, it was without legal authority, and it was acting in defiance of the laws of Congress.

But when the deed of trust is closely examined it will appear that the respondent itself, at the time of the execution of the deed, recognized its incapacity to act outside of the State of Maine, and never contemplated doing any act in execution of the trust within the District of Columbia, but carefully prescribed that even the sale of the District real estate should be made by it at public auction "IN SAID BANGOR" (Rec. 15) several hundred miles away.

It is only on this theory that a provision authorizing a trustee to sell real estate located in a populous city, at a place hundreds of miles away from its location, can be explained or justified.

It is not contended that the rights of the bondholders to the equitable first lien upon this property are in any way affected by the legislation of Congress. Those rights remained and still remain unaffected and unimpaired, but the situation of the bondholders is precisely as it would have been had the trust deed been to any other grantee incapable of executing the trusts, or had the trustee, being a natural person, died leaving no heirs. They would then have been compelled to proceed in equity, either to foreclose the mortgage or for the appointment of a new trustee, in the courts of this District where the property is situated.

In such a proceeding the property would have been sold here, instead of several hundred miles away, and the court could and would have protected the rights of general creditors under the assignment, while giving to the bondholders the exact measure of their rights.

As it is, this is an attempt to dispose of local assets—real estate—in a foreign market, to an undisclosed purchaser for an undisclosed price by an unauthorized trustee, and in defiance of the *lex loci rei sitae.*

II.

The Relation of Landlord and Tenant did not Exist, and the Case was not within the True Intent and Meaning of the Landlord and Tenant Act.

It is claimed by the respondent, that under the deed, by the default in payment of the debt and interest, the respondent as trustee, became *ipso facto* entitled to the possession of of the property; that thereupon the grantor in the deed and those claiming under it became tenants at sufferance of the trustee, and upon giving the notice to quit of thirty days, the trustee acquired the right to proceed under the Landlord and

Tenant Act before a justice of the peace to recover that possession.

It was upon this theory that the respondent prevailed in the Court of Appeals, and this question is the most important one in the case, not only to the petitioners, but to the community generally, as it involves the application of that summary proceeding before a justice of the peace to a class of contracts of a very intricate nature, and of very great importance, and which ever since their origin, have been the peculiar subjects of administration in equity, not only for the purposes of private justice but as matter of public policy.

It is proper also to say at this point that though this Landlord and Tenant Act was passed by Congress in July, 1864, this present case is only the fifth attempt in thirty-three years, which has been made to apply the statute to this class of contracts. This fact alone must be very persuasive with the court that the application attempted to be given to this law has never been recognized as proper at the bar.

It is respectfully submitted that a careful examination of the statute and of the numerous decisions in the various States, in which similar statutes have been passed by the legislatures and applied by the courts, must satisfy this court that the extension of the remedies provided by that statute to cases of this character is wholly without validity, against reason, and against the plain intent and purpose of Congress in passing the act.

The Landlord and Tenant Act of the District of Columbia.

The act which is now Chapter 19 of the Revised Statutes relating to the District (Sections 680 to 690 inclusive), was originally Chapter 243 of the Statutes at Large (13 Stats. 383–384) and was entitled "An act to *regulate proceedings* in cases *between landlord and tenants* in the District of Columbia," while the caption given to it in the revision is simply "Landlord and Tenant."

The meaning or force of a legislative act is not to be defeated by reference to the title, but the title is part of the act and is a proper item of consideration in getting at the intent of the legislature.

Chief Justice Marshall, in Fisher *vs.* Blight, 2 Cr. 386, in construing an act of Congress, says:

> "The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said; and, yet, it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute, and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration."

In United States *vs.* Palmer, 3 Wheat. 631, Chief Justice Marshall, again discussing the question of the force which the title of an act has in construing the act itself, says:

> "The title of an act cannot control its words, but may furnish some aid of what was in the mind of the legislature. The title of this act is 'An act for the punishment of certain crimes against the United States.' It would seem offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish."

Proceeding now to the body of the statute we find its provisions to be as follows:

The first section of the revision (677) abolishes the right of distress by the landlord (Act 1867, 14 Stat. 404).

The second section (678) creates a tacit lien upon the

tenant's chattels on the premises in favor of the landlord (*Ibid*).

The third section (679) prescribes the mode of enforcement of the lien (*Ibid*).

All the following sections are from the Act of 1864 (13 Stat. 383), with scarcely any verbal change:

The fourth section (680) is as follows:

> "A tenancy at will shall not arise or be created without an express contract or letting to that effect, and all occupation, possession or holding of any messuage or real estate without express contract or lease, or by such contract or lease, the terms of which have expired, shall be admitted and held to be tenancies by sufferance."

The fifth section (681) is as follows:

> "All estates at will and sufferance may be determined by a notice in writing to quit of thirty days delivered to the tenant in hand or to some person of proper age upon the premises, or in the absence of such tenant or person, then such notice may be served by affixing the same to a conspicuous part of the premises where it may be conveniently read."

The sixth section (682) excepts from the operation of the two preceding sections contracts made prior to the passage of the act.

The seventh section (683) provides that attornments by a tenant to a stranger shall be void, and shall not affect the rights of the landlord unless made with his consent.

The eighth section (684) is as follows:

> "When forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right after the estate is determined *by the terms of the lease by its own limitation*, or by notice to quit, or otherwise, on written complaint on oath of the person entitled to the premises to a justice of the peace charging such forcible entry or detainer of real

estate, a summons may be issued to a proper officer, commanding the person complained of to appear and show cause why judgment should not be rendered against him."

The ninth section (685) provides that—

"The summons shall be served at least seven days before the appearance of the party complained of."

The tenth section (686) provides for the judgment.

The eleventh section (68[illegible] is as follows:

"If, upon trial, [illegible]fendant pleads title to the premises in himse[illegible] or in another person under whom he claims the premises, he shall recognize in a reasonable sum to the complainant, to be fixed by said justice, with sufficient sureties, conditioned to pay all intervening damages and costs and reasonable intervening rent for the premises; and the complainant shall in like manner recognize to the defendant conditioned to enter the suit at the next term of the Supreme Court of the District, and pay all costs adjudged against him; and thereupon the proceedings shall be certified to said court by the justice. If either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default, and execution shall issue accordingly."

Chief Justice Marshall in the case of Blight *vs.* Fisher, before referred to (2 Cr. 387), in discussing the provisions of the act then under consideration, says:

"Wherever general words have been used in these sections they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense."

All of this act relates to a particular subject—all of its language is restrained by that subject.

Thus, in the first section, the right of distraint for rent in

arrear could only apply to the conventional relation of landlord and tenant. The substitute therefor, the tacit lien in favor of the landlord conferred in the second section, and the provisions for its enforcement in the third section could only apply to that same relation. So, in the fourth section, the terms "tenancy at will" and the word "lease" in connection with, and apparently used synonomously with the word "contract," obviously apply to the conventional relation of landlord and tenant. The notice to quit provided for in the fifth section is appropriate only to the relation of landlord and tenant, and so the attornment of a tenant mentioned in the seventh section is meaningless without reference to that particular relation; while the eighth section (684), in so far as it does not relate to forcible entry and detainer, is confined strictly by its terms to the conventional relation of landlord and tenant by lease of the premises, because the language is—

> "when possession is held without right after the estate is determined *by the terms of the lease by its own limitation*, or by notice to quit, or otherwise."

Thus it will be seen that the language used and all the provisions made in this act are entirely consistent and in harmony with the purpose declared both in the title of the original act, namely: "To regulate proceedings in cases between landlord and tenants," and in the general caption "Landlord and Tenant" given to it in the revision.

There is not to be found anywhere within the language of the statute a phrase, expression, or word which indicates an intent on the part of Congress to extend the operation of the statute to any other relation (except in the case of forcible entry or detainer), than the conventional one of landlord and tenant.

To extend it beyond that relation and to cases of adverse possession by others than the actual tenant or those claiming under him, it is submitted is wholly without warrant.

If this act is not to be restricted to the conventional relation of landlord and tenant, but is to be construed according to the broadest effect which can be given to its language it would dispense with, and in effect, abolish, the action of ejectment, because by Section 680, it is provided that—

> "All occupation, possession or holding of any messuage or real estate without express contract or lease . . . shall be admitted and held to be tenancies by sufferance."

While the succeeding section, 681, provides that—

> "All estates at will or sufferance may be determined by a notice in writing to quit of thirty days."

Yet this court has affimatively decided in ruling upon the Revised Statutes of the United States relating to the District of Columbia that the action of ejectment is not abolished in this District.

Hogan *vs.* Kurtz, 94 U. S. 775.

It is submitted that nothing can be found in the language of this statute which would extend it to the case at bar, which would not equally extend it to any of the adverse occupations of real estate without contract for which the original action of ejectment would be the proper remedy.

But there is to be found in the words of the statute by which justices of the peace are created and their jurisdiction defined, express limitation which necessarily confines the operation of this statute to cases where the conventional relation of landlord and tenant exists, for by Section 997, of the Revision, quoted *supra*, there is expressly reserved from their jurisdiction cases "involving the title to real estate."

It is perfectly obvious that all controversies as to "*occupation, possession or holding of any messuage or real estate without express contract*" would necessarily "*involve the title to real estate*;" except "*in cases between landlords and tenants,*" which

are the only ones which do *not* "involve title to real estate;" and this is so for the reason that in controversies between the landlord and tenant, the landlord is not required to prove any title, because the tenant is not permitted to deny it, except where he undertakes to show that since the tenancy he himself has acquired the title, or the title of the landlord has determined. To provide for this situation arising in "*proceedings in cases between landlords and tenants*," and to preserve the exception from the jurisdiction of the justice of the peace, it is provided by Section 687, quoted *supra*, that—

> "If the defendant pleads title in himself or in another through whom he claims the case shall not be tried by the justice, but shall be certified to the Supreme Court of the District of Columbia."

The serious consequences of extending the application of this statute to any other cases than the conventional relation of landlord and tenant are too obvious to require enumeration; and while the consequences which would ensue from the application of the statute cannot be urged to defeat its plain meaning, they are entitled to be considered and are of great force where the meaning of the statute is not clear, or when it is sought to extend its provisions to cases to which it is not plainly applicable.

As said by Chief Justice Marshall, in Fisher *vs.* Blight, 2 Cr. 390:

> "Where rights are infringed; where fundamental principles are overthrown; where the *general system of the law* is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

As already stated, in the thirty-three years that this statute has been in force in the District of Columbia, only five instances of its attempted application to other than the conventional relation of landlord and tenant can be found.

Decisions in the District of Columbia.

The earliest decision of the Supreme Court of the District of Columbia upon this question is that of Spalding *vs.* Hall, 6 D. C. Rep. 123 (1864). In that case the court say (p. 129):

> "If this language be understood in its broadest acceptation, it would seem to imply that any one who had a legal title to the premises held by the tenant might institute this summary proceeding to recover possession, whether that title was derived from the actual landlord or from some other source. Obviously, that cannot be the intent and meaning of this language; for if so it would at once subvert the common law action of ejectment, and substitute this summary proceeding in its place. The use of the words 'persons entitled to the premises' instead of the word 'landlord,' as in the first section, evinces an intention on the part of the legislature to extend this summary remedy beyond the actual lessor or landlord.
>
> "The true intent and meaning of the legislature was (I think) to extend this remedy to all persons who by the act of lessor or by operation of law, are placed in the same relations to the tenant as the original lessor, to wit, the grantees or assignees, devisees and heirs-at-law of the lessor.
>
> "If this construction of the statute be the true one, it follows that these complainants cannot institute this summary proceeding against the defendants in this case. They are not grantees, devisees, or heirs-at-law of the lessor of the premises in dispute. They certainly are not the landlords of these defendants. Before the expiration of the term of the tenants now holding over, the plaintiffs or complainants obtained from Mrs. Scott, the lessor of the defendants, a lease of the premises for the term of five years, to commence at the expiration of the defendants' tenancy. No relation, therefore, of landlord and tenant ever subsisted between these parties by express contract or by implication of law. This exposition of the statute will confine its provisions to what is its declared purpose, viz., to regulate proceedings in cases between landlord and tenant."

The first departure from this ruling occurs in the decision in the case of Luchs *vs.* Jones, 1 MacA. 345 (1874).

But as appears from the report the question was not involved in the disposition of the case, and what was said was, therefore, a mere obiter. Indeed if dicta can have degrees of weight, the dicta in this case were of the least weight, because the court held that it had no jurisdiction of the case, the conclusion of the opinion being "Let the appeal be dismissed for want of jurisdiction," (p. 349).

The next case is that of Fiske *vs.* Bigelow, 2 MacA. 427 (1876), in which the decision was rendered by the same justice who decided Luchs *vs.* Jones, and though the question of jurisdiction is not noticed there and the court appears to have taken jurisdiction and decided the case, it was precisely the case of which he had, in 1 MacA., declared that they had no jurisdiction. Upon an examination of that case it will be found, first, that the question of jurisdiction was not raised and decided, and, secondly, that the question of the application of this statute to the case before the court was not raised by counsel on either side, and is not decided by the court in its opinion.

This case of Fiske *vs.* Bigelow, 2 MacA. 427, was subsequently brought to this court by writ of error, but the question of the jurisdiction of this court was not raised by either counsel or the court. No question was made, either on the assignment of errors or in the briefs of counsel, as to the Landlord and Tenant Act under which the case arose, and the questions which were presented were regarded by this court as of no consequence, for it affirmed the judgment in the following terms:

> "This judgment is affirmed. We do not think the questions involved are such as to require any further opinion."

The case is not reported, but is No. 114 of the October Term, 1879, decided January 5, 1880.

As no question was made, either in this court or in the court

below, as to the validity of the proceedings under the Landlord and Tenant Act, this court doubtless assumed that it was regularly brought under some local statute, and as the objections which were made appeared to be frivolous the judgment was simply affirmed. Whatever may have been the reasons, however, it is not an authority upon the question here presented, as this question was neither decided nor raised in any court at any stage of the proceedings in that case.

The next case, Barber *vs.* Harris, 6 Mack. 586 (1888), subsequently affirmed in this court in 129 U. S. 366, arose upon *certiorari*, and as appears by the decision of Mr. Justice Merrick, and by the decision of this court, the question was not and could not be presented in that form.

Mr. Justice Merrick says (p. 594):

> "The petition before the justice sets forth the relation of landlord and tenant, and that the justice assumed jurisdiction and acted upon the case as made. Now what may have occurred in proof we do not and cannot know upon an application for *certiorari*."

And then further, after stating the recitals of the complaint, the justice adds:

> "We are of opinion that these averments constitute fully a statement of the relation of landlord and tenant between the parties. Now whether the proofs came up to these averments or not cannot be inquired into upon a writ of *certiorari*. *Certiorari* goes only to the jurisdiction."

In the opinion of this court (129 U. S. 369) Mr. Justice Gray, stating the contents of the petition for the writ of *certiorari*, says:

> "But the petition for the writ of *certiorari*, alleges upon the oath of the petitioner, that he is in possession of the premises under a lease having nearly a year to run, with the privilege of extension for four years more."

Thus it appears that according to the petitioner's own statement he disclosed that the conventional relation of landlord and tenant did exist in that case, and the question of the proper construction and application of the statute was neither decided nor considered, because as stated by the court below, and approved by this court, the facts upon which the suit was founded were not open to inquiry upon *certiorari*.

It may well be that the proceedings in *certiorari*, instead of an appeal, were prosecuted in that case, because of the previous rulings of the Supreme Court of the District of Columbia, that no appeal would lie to the General Term from a decision at special term, upon an appeal from a justice of the peace, as had been held in Luchs *vs.* Jones, *supra*.

The next case is that of Jennings *vs.* Webb, 20 D. C. 317 (1892), heard by Justices Hagner, Cox and James, in which the court, through Mr. Justice Cox, referring to the proceedings under the Landlord and Tenant Act, say:

> "In this proceeding, *unless he establishes the relation of landlord and tenant between himself and the defendant.* no matter what the form of the declaration is, *he is not entitled to recover. I have always held that at special term,* and that is the opinion we entertain now. *It is still a landlord and tenant proceeding.*"

The foregoing presents the entire judicial construction given to the Landlord and Tenant Act from its enactment, July 4, 1864, down to June 15, 1894, a period of thirty years, when the case of Loring *vs.* Bartlett, 4 App. D. C. 1, was decided by the Court of Appeals.

From this review of the decisions it becomes apparent to the court that there is no authoritative decision in this jurisdiction in support of the position of the respondent except the case of Loring *vs.* Bartlett. And it will be further shown that this decision not only stands alone, but is directly opposed to the uniform current of decisions on the question throughout the United States.

The Deed of Trust did not Create the Grantor a Tenant, or Make the Grantee his Landlord.

The theory upon which the decision of Loring and Bartlett rests is that by the terms of the trust deed, the right of possession passed with the title to the trustees, and that the reservation of the right of possession in the grantor operated as a re-demise to the grantor by the grantee of a term in the land, which term expired upon default in the payment of the debt, and by force of the statute the grantor thereby became the tenant at sufferance of the purchaser at the trustee's sale.

This likening of the relation between mortgagor and mortgagee to a tenancy of some sort is quite usual, but is not descriptive of the real legal relations between the parties.

Washburn, in his work on Real Property (5th Ed., pp. 177, 178) says:

> "Courts and writers describe this tenancy by likening it to a tenancy at will or at sufferance, and the like, with a view to defining its character. But the nearest approximation they have made to a definition has been to establish certain resemblances to certain tenancies known to the common law, while the obvious discrepancies have shown that they were far from being identical, and illustrated the remark of Lord Mansfield when speaking of this subject, that 'there is nothing so unlike as a simile and nothing more apt to mislead.'"

It will be observed that the Court of Appeals takes no notice of the decisions previously had in this District upon this statute and cites no authority in support of its own position except that of Barber *vs.* Harris, in this court, 129 U. S. 366, *supra*, which case was, as already shown, turned upon the petition for a *certiorari* which in terms set up an actual tenancy by lease, and the further fact that the aver ments of the complaint to which the court was confined were of a tenancy in conventional form.

This position of the Court of Appeals, irrespective of the construction of the Landlord and Tenant Act, is against the weight of authority.

Thus in Hastings *vs.* Pratt, 8 Cush. 123, Chief Justice Shaw says:

> "Although in a *loose sense* a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Revised Statutes, Chap. 104, Sec. 2. He is not a lessee, or holding under a lessee, or holding the demised premises without right after the determination of the lease."

So in MacCombs *vs.* Wallace, 66 N. C. 483, the court says:

> "In this case the possession of the defendant was not acquired either from the trustee or the plaintiff. There was nothing which can be called a demise. His possession arose out of his own title and continued until the sale by virtue of the reservation in the in trust to that (*sic*). His term has not expired. He had no term for that implies a term derived from some other person."

In a similar case, Burford *vs.* Nolan, 30 Miss. 428, where the land had been sold under a deed of trust containing similar provisions, the court said:

> "To sustain a proceeding of unlawful detainer under this statute the defendant must have entered into possession under the plaintiff, and must continue so to hold possession in violation of the contract of the parties. There is no pretense for saying that the defendant in this case entered into possession under the plaintiff, and he is not, therefore, entitled to this summary remedy."

In Simms *vs.* Humphrey, 4 Denio, 185, where the same contention was made, Bronson, Chief Justice, said:

> "It is said that the clause in the deed to Simms in relation to the possession of the property until the

> first of April, constituted him a tenant for part of a year, and after the day had passed he was the tenant at sufferance and so subject to removal by this summary proceeding. But the clause in question could only operate by way of exception. The possession from the date of the deed to the first of April was not granted. *Simms held during that period by virtue of his* ORIGINAL TITLE *and not under any grant* OR DEMISE *from Humphrey.*"

In Davis *vs.* Hemenway, 27 Vt. 589, the court, in speaking of the relation of mortgagor and mortgagee, says:

> "For the former (the mortgagor) is in equity the owner of the land and the interest of the mortagee is a mere chattel, and a purchaser even after a failure to perform his contract strictly in time has still an equity. And although the mortgagor after the law day has passed and a purchaser after failure to perform hold by a tenure which has been denominated a kind of tenancy by sufferance, still they are neither of them in any sense lessees."

So, in this court, in the case of Burnett *vs.* Caldwell, 9 Wall. 293, Mr. Justice Swayne, speaking of the relation between vendor and vendee, before payment of purchase money, says:

> "If the contract in such cases be silent as to possession by the vendee, he is not entitled to it. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. *The relation of landlord and tenant does not subsist between the parties.* The characteristic feature of that relation is wanting."

It will thus be seen that the authorities generally hold that a grant of property in fee, reserving to the owner who never parts with the possession, the right of possession, does not make him derive any right of possession from his grantee.

Especially must this be so where the reservation is in the terms employed in the deed in this case.

By that clause the grantor is not only permitted to remain in possession and to receive the rents, issues and profits, but he is to do so *"In the same manner, to the same extent and* WITH THE SAME EFFECT AS IF THIS DEED HAD NOT BEEN MADE" (Rec. 15).

So that the court will see that in this case the grantor reserved to itself, *not by virtue of any demise from the grantee* but by virtue of *its original title* in fee simple the right to this possession, in the same *manner* that it had it, to the same *extent* that it had it, *and with the same effect* that it had it, *as though no deed had ever been made.* The manner of its possession and the extent of its possession were such as resulted from its ownership in fee, and the legal effect of that possession made its title and possession still allodial, holding under no superior and being the tenant of no one.

It is, therefore, apparent to the court that even if the principle of a redemise could have been rightly applied to the case of Loring *vs.* Bartlett, it could have no possible application to the deed in this case.

The Conventional Relation of Landlord and Tenant Must Exist to Bring a Case Within the True Intent and Meaning of Landlord and Tenant Statutes.

The statute in question is not a novelty in this country. Statutes similar in their general terms have been passed in nearly all, if not all, of the States of the Union, and counsel confidently challenge the counsel for the respondent to produce a single authoritative decision of any court in the United States, other than the case of Loring *vs.* Bartlett, in the Court of Appeals of this District, extending the application of statutes, similar to this, to any other cases than those where the conventional relation of landlord and tenant subsisted.

As will be shown *infra* decisions throughout the United States on similar statutes have been so numerous and so

harmonious that it may justly be said that the rule is universal that statutes of this description do not extend to cases in which the conventional relation of landlord and tenant does not exist.

Assuming that some sort of tenancy might be said to exist by virtue of this deed, it is still insisted that the Landlord and Tenant Act can have no application to the case. That question must be determined upon the words of the statute and the intent of Congress. Congress is presumed not to have been ignorant of the fact that similar statutes passed in the various States, from their adoption to the time of the passage of this statute, had received judicial construction, and if it had been the intent of Congress to give to this act the far reaching effects and consequences which are claimed for it, it would not have passed a statute similar in its general purport to those which had already throughout the several States been construed to apply only to the conventional relation of landlord and tenant.

The decisions of the Supreme Judicial Court of Massachusetts quoted below are uniform in excluding from the operation of the Landlord and Tenant Statute cases like the present. And it is probably because of those decisions that in the statute of 1882 the words "or when a mortgage of real estate has been foreclosed by a sale under a power contained therein or otherwise," were introduced.

The Massachusetts Statute (Mass. Pub. Stat., 1882, C. 175), reads as follows:

> "Sec. 1. When a forcible entry into lands or tenements has been made, or when a peaceable entry has been made and the possession is unlawfully held by force, when the lessee of lands or tenements or a person holding under such lessee, holds possession without right, after the determination of a lease by its own limitation, by notice to quit, or otherwise, or *when a mortgage of real estate has been foreclosed by a sale under a power contained therein, or otherwise*, the person entitled to the premises may recover possession thereof, in the manner hereinafter provided."

Turning now to the decisions in the State courts, they will be found uniformly to hold that statutes of this character *not containing the words above italicized* or some similar express provision, are inapplicable to any other situation than where the conventional relation of landlord and tenant exists.

Womack *vs.* Powers, 50 Ala. 5:

> "Appellees assert title to the premises under a purchase at a sale made by a trustee under a deed of trust to secure the payment of a debt, executed by the husband of one and the ancestor of the other appellant. . . . The appellees never having had actual possession of the premises cannot maintain the action of unlawful detainer. Actual possession, not constructive possession imputed by law for many purposes to the title, is necessary to maintain that action. Otherwise, in the progress of the suit a controversy as to the title which the statute forbids would inevitably arise. Dumas *vs.* Hunter, 25 Ala. 711. Russell *vs.* Desplous, 29 Ala. 308."

Steiner *vs.* Priddy, 28 Ill. 180:

> "There was no jurisdiction in the justice of the peace in this cause to evict the party. That could only be done by an ejectment. One of two things must exist to give jurisdiction in an action of forcible entry and detainer or forcible entry. There must be either a forcible entry, or the relation of landlord and tenant must exist."

West *vs.* Frederick, 62 Ill. 192.

In this case Frederick loaned a sum of money and took an absolute deed, instead of a mortgage, giving back a contract to reconvey upon the payment of the sum loaned within one year. The money not being paid at maturity Frederick brought his action of forcible detainer.

The court said:

> "This position is untenable. These parties are not vendor and vendee, and the defendant has not

> obtained possession of the land under a contract with the plaintiff. In two particulars the case is beyond the reach of the statute. It is stated by the plaintiff himself in his testimony that these instruments were executed merely as security for the loan of money. But even if the proof on this point were less conclusive the fact that the defendant did not derive his possession from the plaintiff would of itself be fatal to this action."

In Read *vs.* Elwell, 42 Me. 270, and Sawyer *vs.* Hanson, 24 Me. 542, proceedings for forcible entry and detainer under a similar statute were brought against the mortgagor, founded upon a sale of the mortgaged premises for default in payment of the debt. In both of these cases the court held that the action would not lie.

In Sawyer *vs.* Hanson, the court said:

> "To bring the case within the fifth section the relation of landlord and tenant must be shown to have existed and the lease to have terminated and the holding over by the lessee. The language clearly imports that the process under this part of the statute shall be in favor of a lessor or his assignee against a lessee, or one holding under him. The determination of the estate referred to may be of a lease for years or where a tenancy at will existed; it was not intended for those cases where the title could be contested." (pp. 544–545).

Short *vs.* Bridwell, 15 Ind. 211:

> "The appellants contend that the justice had jurisdictions under the provisions of 2 R. S. 1852, Chap. 4, p. 490.
>
> "Under this statute the relation of landlord and tenant must exist between the parties, or the defendant must have made unlawful or forcible entry into the land, and either peaceably or forcibly detained the same; or having peaceably obtained the possession he must unlawfully and forcibly keep the same; otherwise the justice has no jurisdiction."

MacCombs *vs.* Wallace, 66 N. Carolina, 482–3.

This was an action before a justice of the peace under the North Carolina statute. The defendant had executed a deed of trust to the plaintiff providing for a sale of the land if the debt was not paid, and also providing as follows:

> "It is further the understanding and agreement of the parties that the said party of the first part (the defendant) shall retain possession of the said premises until the same shall be sold by the said party of the second part."

The trustee sold the property under the deed of trust to the plaintiff who brought the action before a justice of the peace under the Landlord and Tenant Act. The court held:

> "Upon a careful consideration of this act we think it was intended only to apply to a case in which the tenant entered into the possession under some contract, either actual or implied, with the supposed landlord, or with some person under whom the supposed landlord claimed in privity, or when the tenant himself was in privity with some person who had so entered.
>
> "This construction would exclude two classes of cases, which we think were not intended to be embraced in the act, viz.: Vendees entering into possession under a contract of purchase, and vendors continuing in possession under circumstances like the present. Such persons are certainly tenants at will or sufferance for many purposes and they are frequently so called. Jones *vs.* Hitt, 64 N. C. 198. But they seem to be excluded as well by the words of the section above cited, as by the general scope and spirit of the act. The words of the section clearly require that an entry should be made under a demise of some sort, although there is no reason for saying that it must be for any definite term; it may well be at will.
>
> "In this case the possession of the defendant was not acquired from either the trustee or the plaintiff; there was nothing which can be called a demise; his

possession arose out of his own title and continued until the sale by virtue of the reservation in the in trust to that (*sic*). His term has not expired; he had no term, for that implies a term derived from some other person."

In the case of Hastings *vs.* Pratt, 8 Cushing, 121–2–3, the mortgagee attempted to obtain possession under a summary proceeding under the Landlord and Tenant Statute. Chief Justice Shaw, in rendering the decision of the court, said:

"The present statute contemplates three cases in which this process will lie. One, forcible entry; two, forcible detainer; three, a tenant holding against his landlord either (1) after the determination of a lease by its own limitation, or (2) after the expiration of a notice to quit duly given, or (3) after a notice of fourteen days for nonpayment of rent. Rev. St., Chap. 104; Statutes of 1847, Chap. 267. See Fifty Associates *vs.* Howland, 11 Met. 99. . . . Although in a loose sense a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason of the letter of the Revised Statutes, Chap. 104, Sec. 2. He is not a lessee or holding under a lessee or holding the demised premises without right after the determination of the lease. The remedies of a mortgagee are altogether of a different character clearly marked out by law. Upon the facts, the court are of opinion, that the plaintiff's case is not within the statute and that the defendant is entitled to judgment."

In the case of Boyle *vs.* Boyle, 121 Mass. 85, the same question arose and again in the case of Woodside *vs.* Ridgway, 126 Mass. 292. In both cases Mr. Justice Morton delivers very full opinions, reviewing the previous decisions in the Supreme Judicial Court of Massachusetts, and also the history of the statute.

In the case of Boyle *vs.* Boyle the learned judge says:

"We find no case in which it has been held that

> the mortgagee or other grantee not in possession can maintain this process for the purpose of obtaining possession." . . .

And again, he says:

> "It was not intended by this summary process before a justice of the peace to try questions of the title to real estate, but to give a speedy remedy to those who, being in possession of the land, are unlawfully dispossessed by a strong hand. Similar statutes in other States have received a like construction. The plaintiff, therefore, cannot maintain this action as assignee of the mortgagee and for the same reason he cannot maintain it if he has acquired a title to the estate under a sale by virtue of the power contained in the mortgage."

See also the very full discussion of this question by Chief Justice Shaw in the case of Howard *vs.* Merriam, 5 Cush. 564.

In Larned *vs.* Clarke, 8 Cush. 29, the mortgagee recovered a judgment for possession against the mortgagor, and was given possession under a writ of *habere facias*, but permitted the mortgagor to remain on the premises. The mortgagee then leased the land to the plaintiff, who then brought the present action of forcible entry and detainer (under R. S., Ch. 104) against the mortgagor:

Held, Shaw, C. J. The process given by R. S., Ch. 104, will not lie.

> "Then the question is whether the process can be maintained on the other branch of the statute, designed to afford remedies as between landlord and tenant. R. S., Ch. 104, § 2. . . . Upon the evidence reported we can see no ground to hold that the defendant ever held or claimed to hold as a tenant of Cutler (the mortgagee), or under any lease or demise whatever. . . . But whilst the parties stood in the relation of mortgagor and mortgagee and before judgment and execution, we think the defendant was not lessee within the meaning of this

> statute. A mortgagor in possession is sometimes in a loose sense said to be tenant at will to the mortgagee. But he is not liable to rent or to account for rents and profits; these he holds to his own use. He is like a tenant at will because the mortgagee may enter upon the estate at his will, if he can do so peaceably when not restrained by covenant. Moss *vs.* Gallimore, 1 Doug. 265–269. "But were the law otherwise in this respect, it would not alter the present case, because the defendant is not in as a lessee whose term is expired, and clearly is not within the statute."

In Leavitt *vs.* Wallace, 12 N. H. 493, the court, Parker, Chief Justice, says:

> "But the Act of July 1, 1831, providing further remedies for landlords and tenants is confined to these cases where there has been a tenancy, and is not to be applied to cases where the occupant holds adversely, and the relation of landlord and tenant has never existed. The title of the act indicates this. And the language in several places in the act itself shows that this is the true construction of it.
>
> "As it appears here that no tenancy had ever existed on the part of the respondent under the title set up by the complainant, this proceeding cannot be sustained notwithstanding the disclaimer."

In the case of the C., B. & Q. Road *vs.* Skupa, 16 Neb. 341, the defendant had purchased a parcel of land and entered into a contract for the deferred purchase money in which it was provided that in the event of nonpayment of the deferred purchase money, the right of possession and all equitable and legal interest in the premises should revert and revest in the vendor, and it also contained this stipulation:

> "And the party of the second part covenants and agrees that if he is allowed to remain in possession of the land after default he shall hold his possession as tenant at will of the party of the first part."

The court, Reese, Justice, after setting forth the provisions of the statute of Nebraska, says:

> "We have quoted these sections of the statute at length for the purpose of showing in what cases and under what conditions a justice has 'power to inquire' into the unlawful detention of property. . . . This contract is a contract of sale and not a lease. It must be one or the other. It cannot be said that if the purchaser fails to pay an installment of purchase money at the time it is due, the vendor cannot enforce the contract against him; that it then becomes a lease and so continues until the purchaser pays the installment due; and that such payment again changes it into a contract of sale."

The court further says:

> "So long as the contract of sale continues so long has the purchaser an interest in the subject of the contract. So long as that interest or title exists the justice has no jurisdiction in the case. In an action in ejectment or other proper proceeding in a court of general jurisdiction, all equities and defenses can be fully adjudicated. In justice's court that cannot be done for the reason that no jurisdiction or authority to do so exists, and, therefore, in suits between vendor and vendee growing out of the contract of sale the district court only has jurisdiction."

In Burford *vs.* Nolan, 30 Miss. 427–428, which was a case of unlawful detainer under the statute before a justice of the peace, the court thus states the case and applies the law:

> "Nolan executed a deed of trust to secure certain debts therein named upon a tract of land, being at the time in possession of the same, and making default in payment the land was sold by the trustee when Burford became the purchaser. Did the plaintiff pursue the proper remedy to gain possession of the land? We cannot look beyond the letter of the statute with a view of furnishing an answer to this

question; for to enable the plaintiff to succeed he must bring himself clearly within the rule which applies to all special or statutory jurisdiction."

"The statute is in these words: 'If any person shall enter or shall have entered in a peaceable manner into any lands or tenements in cases where such entry is lawful, and after the expiration of his right shall continue to hold the same against the consent of the party entitled to the possession,'" etc.

"To sustain the proceeding of unlawful detainer under this statute, the defendant must have entered into possession under the plaintiff and must continue so to hold possession in violation of the contract of the parties. There is no pretense for saying that the defendant in this case entered into possession under the plaintiff and he is not, therefore, entitled to this summary remedy."

In Roach *vs.* Cosine, 9 Wend. 232, Savage, Chief Justice. in applying the New York statute, says:

"It cannot be contended that the statute under which these proceedings were had was intended to afford an expeditious mode of foreclosing a mortgage. It was intended to apply to the cases of landlord and tenant strictly and the other cases specified. It has often been said that the mortgagor after forfeiture is *quasi* tenant of the mortgagee; but he is so only for the purpose of receiving notice to quit. 18 Johns. R. 488; 6 Cow. 148, and cases there cited. He is not that kind of a tenant, who is to be dispossessed in the summary manner contemplated by this statute."

In People *vs.* Simpson, 28 N. Y. 56, Marvin, Justice, after referring to the terms of the Statute of New York, says:

"By the construction given to the statute it must appear that the relation of landlord and tenant existed by agreement and not by mere operation of law; that the relation was conventional."

And Selden, Justice, in the same case, says (p. 58):

> "It has often been decided that to authorize such proceedings the conventional relation of landlord and tenant must be shown to exist and not a tenancy created by the mere operation of law."

In Simms *vs.* Humphrey, 4 Denio, 185, the defendant had sold the premises to the plaintiff and in the deed was a stipulation: "Possession of said premises to be retained by the said party of the first part until April 1, 1844."

The action was brought before a justice of the peace under the Landlord and Tenant Act against the defendant for holding over. The court, by Bronson, Chief Justice, after pointing out that the statute applied only to the conventional relation of landlord and tenant, said (page 188):

> "It is said that the clause in the deed of Simms in relation to the possession of the property until the first of April constituted him a tenant for a part a year, and after the day had passed he was a tenant at sufferance, and so subject to removal by this summary proceeding. But the clause in question could only operate by way of exception. The possession from the date of the deed to the first of April was not granted. Simms held during that period by virtue of his original title and not under any grant or demise from Humphrey. After the first of April it was the case of a grantor in possession after he had parted with all his original title. If that made him a tenant at sufferance to the grantee, still as the relation of lessor and lessee had never existed between the parties, the case did not come within the statute. We think the justice had no jurisdiction."

In Davis *vs.* Hemenway, 27 Vt. 589, the equitable mortgagee brought forcible entry and detainer against the defendant, the mortgagor. Redfield, Chief Justice, in delivering the opinion of the court, held:

> "In regard to the extent of this remedy it is ob-

vious to us that under the fifteenth section which expressly limits the remedy to a written lease and a demand in writing after the determination of the lease for the surrender of the premises, or the twenty-third or thirtieth sections which only extend to 'the lessee of lands,' 'or the person holding under such lessee,' could have no just application to the case of an equitable mortgagee and probably not even to the case of a purchaser of the land in possession. For the former is in equity, the owner of the land, and the interest of the mortgagee is a mere chattel, and a purchaser even after a failure to perform his contract strictly in time has still an equity. And although the mortgagor after the law day has passed and a purchaser after failure to perform, held by a tenure which has been denominated a kind of tenancy by sufferance, still they are neither of them in any sense lessees."

In Steele *vs.* Bond, 28 Minn. 267, an action was brought under the Minnesota Landlord and Tenant Statute, founded upon a lease which the defendant claimed was in reality a mortgage, but as to which the defendant was in default.

Clark, Justice, in delivering the opinion of the court, says:

"The act concerning forcible entries and unlawful detainers so far as it affords a remedy for landlords against tenants who unlawfully detain the premises after a default in the payment of the rent, or the expiration of the term, must be construed as similar acts have always been construed by the courts of other States, to apply only to the conventional relation of landlord and tenant. It was not intended as a substitute for the action of ejectment, nor to afford means of enforcing agreements to surrender possession of real estate where either the relation does not exist or has not existed. The foundation upon which the jurisdiction rests is that the tenant is in possession of the land in consequence and by virtue of that relation, and unlawfully withholds possession after a default in the performance of the terms upon which he entered, or after his term has expired. The complaint in this action states a

> case of that character and one in which the municipal court has full power to grant restitution. The answer sets up matters which control the legal effect of the laws on which the complaint is founded, and show, if true, that the relation of landlord and tenant was not created by it and does not exist between the parties. This is a good defense to the action if established" (p. 273).

In Ainslee *vs.* Howlett, 76 N. Y. 574, where the defendant claimed that the agreement between him and the plaintiff was a mortgage and not a lease, the court held that to be a sufficient defense to the proceeding under the Landlord and Tenant Act, and the court further held (p. 580):

> "The essential requisite to authorize these proceedings is that the conventional relation of landlord and tenant should exist."

In Evartson *vs.* Sutton, 5 Wend. 281, Savage, Chief Justice, delivering the opinion, says:

> "The statute under which these proceedings were had provides that where any tenant or lessee at will, or sufferance, or for part of a year, or one or more years, or from year to year, shall hold over after the expiration of his term, it shall be lawful for the landlord or lessor to make oath in writing to such holding over without permission, and thereupon to apply to a judge who shall issue a summons and take other proceedings pointed out in the statute ending in a warrant to deliver possession to the landlord or lessor. This statute is applicable between landlord and tenant only. No such relation existed between the plaintiff and Jerome, or between Jerome and Terry. The whole proceedings, therefore, from beginning to end, have been without jurisdiction and void.
>
> "The contract between the plaintiff and Jerome was set out in the affidavit upon which the proceedings were had putting the plaintiff in possession. It is a mere executory contract by which Jerome is considered the owner of the property, and he agrees

> to give possession at a certain day, and the use of the property he agrees shall be equivalent to the interest accumulating on the debt he owed the plaintiff. Now so far as analogy exists between this agreement and a lease it goes to show that the plaintiff was to set off the use of the property (or the rent) against the interest of his mortgages. Jerome in this transaction is most like a landlord, and the plaintiff a tenant; but in truth there is no pretense for anything like a tenancy. The judge might as well have undertaken to enforce any agreement for the purchase and sale of real estate. It is true indeed that for some purposes the mortgagor is considered the tenant to the mortgagee and the vendor of land who continues in possession after the sale under an agreement to deliver possession on a certain day is tenant to the purchaser. 4 John. R. 150. So, also, the same relation exists in other cases, 7 Cow. 323–6; but the statute of 1820 was clearly designed to afford a speedy remedy where the *conventional* relation of landlord and tenant existed and not where that relation is created by operation of law. The legislature never intended that a mortgagee should have a right to proceed under this statute to obtain possession of the mortgaged premises after forfeiture."

In Greer *vs.* Wilbar, 72 N. C. 592–594, Pearson, Chief Justice, in delivering the opinion of the court, says:

> "The Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession until default in making payment, and on demand, after default, refuses to surrender possession. MacCombs *vs.* Wallace, 66 N. C. Rep. 481. The mortgagee cannot be let into possession by summary process before a justice of the peace, but has his remedy by action to foreclose, or by action to recover the land on his legal title, to which action the equitable title of the mortgagor may be interposed by way of counter claim."

In Johnson *vs.* Hauser, 82 N. C. 385, the defendant had

agreed to purchase a piece of real estate and was put in possession by the vendors under an agreement that he would pay the balance of the purchase money at the end of twelve months or surrender up possession. The plaintiffs claimed that this made him a tenant and brought proceedings for possession under the Landlord and Tenant Act. The court by Ashe, Chief Justice, says:

> "The construction given to the Landlord and Tenant Act by several decisions of this court, is that it applies only to the relation of lessor and lessee when the latter holds over after the expiration of his term and when there is no other relation to complicate the question. But where one enters upon land under a contract of purchase he cannot be evicted therefrom by a summary proceeding under the act. Greer *vs.* Wilbar, 72 N. C. 592. Riley *vs.* Jordan, 75 N. C. 180. MacCombs *vs.* Wallace, 66 N. C. 481."

In Benjamin *vs.* Benjamin, 5 N. Y. 388, the court said:

> "To entitle a party to this summary remedy it must appear that the relation is a conventional one, created by agreement, not by mere operation of law. This is well settled. Evartson *vs.* Sutton, 5 Wend. 281; Roach *vs.* Cosine, 9 Wend. 227; Simms *vs.* Humphrey, 4 Denio, 186. The relation of landlord and tenant does not necessarily exist in many cases where the legal ownership is in one person and the possession in another, although by the express compact of the parties. . . . If any other question than such as related to the tenancy and the holding over is to be litigated between the parties, recourse must be had to an action instead of this summary proceeding" (p. 388).

In Williams *vs.* Bigelow, 11 How. Pr. 88, the plaintiff agreed to sell certain property to the defendant, who was let into possession thereof, with the agrement that it would be conveyed to him when he had finished paying the purchase money. The defendant made default in his payments, and

the plaintiff gave him a notice that he should consider the contract at an end. The defendant refused to pay the purchase money, but remained in possession and held over, but without the permission and against the will of the plaintiff. The court, by Greene, Justice, held, (page 88):

> "On this state of facts there is not even a colorable pretence for treating Williams as the tenant of Bigelow, within the meaning of that term as used in the statute. These summary proceedings are given between those who stand in the conventional relation of landlord and tenant, and not those who become such by operation of law, except in the cases specially provided for and specified in the statute."

In Stockbridge *vs.* Nute, 20 N. H. 273, the court said:

> "The two hundred and ninth chapter of the Revised Statutes was provided for the relief of landlords against their tenants and is applicable only where the relation of landlord and tenant exists, or rather, having existed, has been dissolved by the expiration of the term or by some act or omission of the parties. By the process which the statute furnishes the title to the land cannot be drawn in question, the only inquiries being, did the relation of landlord and tenant ever exist between the parties? And has the right of the defendant acquired by that been lost?"

In people *vs.* Hovey, 4 Lansing, 89, the court say:

> "No rule of law is better settled than that the relation of landlord and tenant must be proved to exist between the persons seeking to remove another who is in possession, from premises, by summary proceedings under 3d Revised Statutes."

In Mitchell *vs.* Simpson, 14 Abb. Pr. 460, the court say:

> "It (the Landlord and Tenant Act) was not intended and does not provide for the obtaining of possession of land in any case except those in which the relation of landlord and tenant exists, and applies to no one but a tenant."

In Hays' Heirs *vs.* Conneley's Heirs, 1 A. K. Marsh (Ky.), 393 (1818), Judge Owsley delivered the opinion of the court (Absent, Judge Logan):

> "The ancestor of the appellees, having obtained the possession of the land in contest, under a contract with the ancestor of the appellants for a conveyance, we are of opinion that, in the sense intended by the act regulating proceedings for forcible detainers, he cannot be said to have obtained the possession as tenant, so as to have either authorized the ancestor of the appellants in his lifetime, or his heirs since, in a proceeding under the act, to have obtained restitution, on account of the failure either of the appellees or of their ancestor, to surrender the possession.
>
> "The judgment must be affirmed with cost."

In Settle *vs.* Henson, 1 Ia. 111, the court said that there were two cases where this action applies: 1st. Where force is used in entry, etc., and 2d. Where tenant holds contrary to terms of lease. The court, in its opinion, says:

> "In regard to the 1st class of cases the proceedings are in the nature of a penal action. The offending party may be punished by fine. The case at bar must fall within this class, for there is no pretense that the defendant was the tenant of the complainant or of the United States under whom she claimed. Under these circumstances it was incumbent on the complainant to show that she was in possession at the time of the entry of which she complains. As she had never been in possession she will be driven to an action of a different form in order to vindicate her rights. . . . These actions are intended as summary remedies to restore possession which has been irregularly molested, or where there has been a holding over in flagrant violation of the terms of a lease, but can never be made a substitute for the action of right."

In State, *ex rel.* Godgion *vs.* Latimer, 26 S. Car. 208, the proceeding was by *certiorari* to test the jurisdiction of a justice

in ordering the relator ejected from certain real estate. The relator was in possession of premises under the mortgagor, and agreed with the purchaser at a foreclosure sale to lease the land from him, but he afterwards failed to do so, and refused to surrender possession.

In this case it was held that there are four classes of cases in which trial justices have jurisdiction of the matters of ejectment for summary action; first, where tenants desert the premises and fail to pay rent; second, where tenants hold over after the determination of lease; third, where tenant at will neglects to give up premises upon notice; and fourth, where tenants hold over after the expiration of their leases, or fail to pay rent.

Simpson, C. J., in delivering the opinion of the court says (page 212):

> "Now to give a trial justice jurisdiction the record must show a case falling under some one of these sections. . . .
>
> "The only charge is that the defendant was in 'unlawful possession' of the premises of Mrs. Latimer, which, if anything, was the foundation of an action in the court of common pleas. The summons then issued by the trial justice, which was the only paper before me, is entirely without any jurisdictional effect. It is apparent that he could not proceed independent of the other irregularities in the case.
>
> "Nor do we think that the testimony cured the defect. This certainly did not bring the case under Section 1818, as there was no tenancy at will. . . . And if it did, then the ten days notice was not given. Nor does it bring it under Section 1819, as there was no expiration of a lease proved, nor a failure to pay rent when due. The proof being that the relator had not secured the rent by a rent contract."

In Hughes *vs.* Mount, 23 W. Va. 130, which was an action of unlawful entry and detainer, the court, by Woods, J., at page 134, say:

> "Was this an action in which the title to land in

> the warrant mentioned would properly come in question under the trial thereof; if it was, and if the relation of landlord and tenant did not exist between plaintiffs and defendants, the justice had no jurisdiction to try the case. Upon this question he has no discretion, and the statute is imperative; IT IS HIS DUTY TO DISMISS IT. . . . But if . . . it appears on the trial of the cause that the title to the land is properly in question between the parties, and that the relation of landlord and tenant does not exist between them, then it becomes the duty of the justice to dismiss such action."

In Winterfield *vs.* Strauss, 24 Wis. 394, an application for an injunction to restrain the prosecution of an action for unlawful and forcible detainer was made. The court, Dixon, C. J., says (p. 399):

> "That the summary remedy comprehended by the statute, R. S., Ch. 151, for recovering the possession of land before justices of the peace is not one, in which the title to the premises can be brought in question, and consequently not a substitute for the action of ejectment, was long ago decided by this court. Gates *vs.* Winslow, 1 Wis. 650; Ferrell *vs.* Lamar, Id. 8. The doctrine of those cases as to the extent and application of the remedy is the same in all the States, the statutes in each embracing in substance the provisions of the old English statutes, and having the same intention, namely, to prevent and punish acts, which endanger the public peace, and to provide the summary dispossession of tenants holding over after the expiration of their terms, or contrary to the conditions or covenants of the leases or agreements, under which they entered. Cases of the latter kind are provided for by the 12th section of the act. And in those cases, of course, no question of title can arise. Since the tenant is estopped to deny the title of his landlord, the only inquiry in them is as to whether the conventional relation of landlord and tenant exists, and if it does, then whether the tenant is holding over after the expiration of his term, or contrary to the covenants or conditions of his lease.

> It is in cases of this kind that the remedy of unlawful detainer may be resorted to, and it can be extended to no other."

In Nightingale *vs.* Barrons, 47 Wisconsin, 389, a proceeding under statute of forcible entry and detainer to obtain possession of lands, the court say (p. 392), per Orton, J.:

> "We think it is the legal effect of this instrument under the circumstances, and that it was clearly the intention of the parties, that the appellant should re-enter into the possession of the premises, not as a mere lessee, but with other rights in the same (and whether as the prospective purchaser, or as mortgagor we do not decide), and that the relation between the parties in respect of the use and possession of the same was not merely of landlord and tenant. And therefore we must hold that this proceeding under the statute will not lie. In all the elements and particulars of this transaction there could not well be a stronger case presented of a conditional sale or contract of purchase, or of the keeping alive and continuance of a mortgage under the form of a lease, or the assumed relation of landlord and tenant. It was decided in Plato *vs.* Roe, 14 Wis. 453, that where an absolute deed and a contract of defeasance or to reconvey were executed, and the consideration was a loan of money, and the grantee also at the same time gave the grantor a lease of the premises, the transaction constituted a mortgage, and the pretended lessor could not have this statutory remedy as against a tenant holding over."

The case of Saunders *vs.* Doake, 3 Tex. 143, was an action before a justice of the peace under the Act of 1842 providing a summary remedy to enable landlords to obtain possession of lands, etc.

The court said (p. 144):

> "To authorize this suit defendant must have been either first, a tenant, or second, a person 'in possession' or 'holding possession' by, from, under or by collusion with a tenant. The one or the other is essential to the plaintiff's right to sue under the statute."

In Wheelock *vs.* Warschaur, 21 Cal. 309–316 (1863), the court said:

> "The right to maintain this action (of forcible entry and detainer) depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession."

In Pico *vs.* Cuyas, 48 Cal. 639–642 (1874), speaking of the action of forcible entry and detainer, the court said:

> " . . . The plaintiff could never recover the possession in the present form of action, because the relation of landlord and tenant did not exist by convention."

In the hearing on the writ of error it was also objected that this proceeding was in effect one to foreclose a mortgage and involved a controversy over a debt of thirty-five thousand dollars, both matters wholly without the jurisdiction of a justice of the peace. These questions are fully argued in the brief filed in this cause upon the writ of error at pages 10 to 16 inclusive, and while it is not deemed necessary to repeat the discussion here, reference is made to it in case it should interest the court in the present proceeding.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and this controversy should be left for settlement to a court of equity, to which properly belongs the superintendence of the trusts committed to the two trustees, and which has the power to preserve the legal and equitable rights of all the parties.

CALDERON CARLISLE,
WM. G. JOHNSON,
For Petitioners.